MICHIGAN SUPREME COURT

Office of Public Information

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FOR IMMEDIATE RELEASE

DRUNK DRIVING DEFENDANT DENIED HOSPITAL OF HIS CHOICE FOR BLOOD TEST; SUPREME COURT TO DECIDE WHETHER TO DISMISS CHARGES

LANSING, MI, March 3, 2006 – Should drunk driving charges be thrown out because the driver, who by statute had a right to an independent blood alcohol test, was not taken by police to the hospital of his choice for the test? That is one of the questions the Michigan Supreme Court will consider during oral arguments next week.

In *People v Anstey*, a breathalyzer test performed at the county jail showed that the defendant driver had a blood alcohol level of .21 percent. When informed of his statutory right to an independent chemical test, the defendant first chose a hospital in South Bend, Indiana. When the arresting officer refused to take him there, the defendant asked to be taken to a hospital located about 15 to 20 minutes from the jail. The arresting officer again refused, but offered to take the defendant to another hospital a few blocks away from the jail; the defendant refused. A district court judge found that the officer was unreasonable in refusing to take the defendant to the second hospital, and the circuit court dismissed the drunk driving charges; the Michigan Court of Appeals upheld this ruling, which the prosecutor now challenges.

Also before the Court is *Greene v A.P. Products*, in which a woman seeks damages for the death of her 11-month-old son. The boy died after ingesting ginseng oil that his mother bought at a beauty supply store; she sued the supply store and the product manufacturer, contending that the product was defective and lacked appropriate warnings. Although a circuit court threw out her claims, the Court of Appeals reinstated the mother's lawsuit. The defendants have argued that the lack of a warning was not the proximate cause of the boy's death, and that the product was misused in a way that was not reasonably foreseeable.

The Court will also hear arguments in *Grievance Administrator v Fieger*, in which the scope of lawyers' First Amendment rights is at issue. After the Michigan Court of Appeals overturned a $15 million verdict in favor of his client, the respondent attorney made comments on a radio program about the three judges on the appellate panel. The Court will be asked to consider whether those comments are protected by the First Amendment, and whether the Attorney Discipline Board has the authority to declare attorney ethics rules unconstitutional.

The remaining 10 cases involve the Freedom of Information Act, the dramshop act, property taxes, foreclosure, premises liability, arbitration, constitutional issues, and criminal law.

Court will be held on **March 7, 8 and 9.** Court will convene at **9:30 a.m.** each day. The Court will hear oral arguments in its courtroom on the sixth floor of the Michigan Hall of Justice in Lansing.

(*Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available on the Supreme Court's website at* http://courts.michigan.gov/supremecourt/Clerk/msc_orals.htm. *For further details about the cases, please contact the attorneys.*)

Tuesday, March 7
Morning Session

PEOPLE v PIPES (case no. 129152)
PEOPLE v KEY (case no. 129154)
Prosecuting attorney: Jeffrey Caminsky/(313) 224-5846
Attorney for defendant Cedric Pipes: Daniel J. Rust/(313) 837-7734
Attorney for defendant Julian Dale Key: Jonathan B.D. Simon/(313) 964-0533
Trial court: Wayne County Circuit Court
At issue: The two defendants made statements to police regarding the crime. At a hearing on their motions to sever the trial, both made an offer of proof indicating that they were going to testify. Based on those offers, the trial court determined that the defendants' various statements could be admitted during a joint trial without violating either defendant's constitutional rights, so long as the jury was instructed to consider each statement only against the person who made it. The statements were admitted into evidence, but the defendants ultimately decided not to testify. The Court of Appeals found that they were denied their right of confrontation by the admission, at their trial, of the nontestifying co-defendant's statements. Are the defendants entitled to a new trial?
Background: In a joint trial, Cedric Pipes and Julian Key were convicted of first-degree premeditated murder for a drive-by shooting that resulted in the death of a three-year-old child; they were sentenced to life in prison. Both Pipes and Key made statements to police about the crime. At trial, the court admitted those statements into evidence and instructed the jury that each statement was only to be considered against the defendant who made it. The trial court made this decision after both defendants made an offer of proof at an earlier hearing, indicating that they were going to testify. In fact, neither defendant testified at trial. In an unpublished 2-1 opinion, the Court of Appeals reversed both convictions. The Court of Appeals cited *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), in which the United States Supreme Court held that a defendant is deprived of his right to confrontation when his codefendant's incriminating confession is introduced at a joint trial, even if the jury is instructed to consider that confession only against the codefendant. One Court of Appeals judge dissented, arguing that the defendants had waived their right to claim constitutional error because they told the trial court that they would testify and the trial court's decision was based upon that offer of proof. The prosecutor appeals.

PEOPLE v ANSTEY (case no. 128368)
Prosecuting attorney: Aaron J. Mead/(269) 983-7111
Attorney for defendant Mark Joseph Anstey: Gail O. Rodwan/(313) 256-9833
Trial court: Berrien County Circuit Court
At issue: The defendant was arrested for operating a vehicle with an unlawful blood alcohol level. He exercised his right to request an independent chemical test of his alcohol level, and asked to be transported to one of two hospitals, one of them in Indiana. The officer refused to take the defendant to the requested hospitals, but offered to take him to the nearest hospital, which was located a few blocks away from the jail. The defendant refused. Was the defendant's right to an independent chemical test violated when the officer refused to take him to one of the two hospitals the defendant requested? If so, is the defendant entitled to dismissal of the charges brought against him?
Background: Officer Shane Daniel arrested Mark Joseph Anstey for operating a motor vehicle with an unlawful blood alcohol level and while under the influence of liquor. A breathalyzer test performed at the Berrien County Jail indicated that Anstey's blood alcohol level was .21 percent. Daniel informed Anstey of his right, pursuant to MCL 257.625a(6)(d), to obtain an independent chemical test after taking the chemical test administered by police. Anstey asked Daniel to take him to South Bend Memorial Hospital in Indiana for the independent chemical test, which the officer refused to do. Anstey then asked to be taken to Watervliet Community Hospital, located about 15 or 20 minutes from the Berrien County Jail. Daniel refused this second request, but offered to take Anstey to Lakeland Hospital, which was located only a few blocks from the jail. Anstey refused that offer and never obtained an independent test of his alcohol level. He filed a motion to dismiss the charges brought against him, arguing that dismissal was the only proper remedy for the officer's refusal to allow him to obtain an independent chemical test at a hospital of his choosing. The district court judge concluded that Anstey's request to be taken to South Bend Memorial Hospital was unreasonable because such a trip would have required Daniel to travel to a state where he had no jurisdiction. But the judge found that the police were unreasonable in refusing to take Anstey to Watervliet Community Hospital. The judge did not dismiss the pending criminal charges, but did rule that evidence of the breathalyzer test would be excluded from evidence. Anstey appealed to the circuit court, arguing that the proper remedy was dismissal of the charges. The circuit court ruled in his favor, reversing the district court and remanding the case to the district court for entry of an order dismissing the charges. The prosecutor appealed to the Court of Appeals, which affirmed in an unpublished opinion. The prosecutor appeals.

CITY OF TAYLOR v THE DETROIT EDISON COMPANY (case no. 127580)
Attorney for plaintiff City of Taylor: Mary Massaron Ross/(313) 983-4801
Attorney for defendant The Detroit Edison Company: William K. Fahey/(517) 371-8100
Attorneys for amicus curiae International Transmission Company and Michigan Electric Transmission Company: Daniel J. Martin/(616) 776-7500, Stephen O. Schultz/(517) 371-8152
Attorneys for amicus curiae Michigan Electric Industry: Christine Mason Soneral/(517) 374-9184, Jon R. Robinson/(517) 788-2151, James A. Ault/(517) 484-7730
Attorney for amicus curiae Michigan Municipal League and the Michigan Townships Association: David W. Centner/(616) 459-1171
Attorney for amicus curiae Michigan Public Service Commission: Michael A. Nickerson/(517) 241-6680

Attorney for amicus curiae Telecommunications Association of Michigan: Michael A. Holmes/(517) 371-1730
Trial court: Wayne County Circuit Court
At issue: As part of a major renovation of Telegraph Road, the city of Taylor adopted an ordinance requiring the Detroit Edison Company to place underground electric wires attached to utility poles along the road and to bear the related expense. What power does the city have as a result of its constitutional authority to exercise reasonable control over its streets? What authority allows the city to shift the cost of relocation of utility equipment to Detroit Edison? And how should the city's constitutional authority be reconciled with the Michigan Public Service Commission's broad authority to regulate utilities?
Background: In 1999, the city of Taylor began planning a major renovation of Telegraph Road. Detroit Edison has utility poles holding electric wires along the street, and the city and Detroit Edison discussed placing the wires underground. Detroit Edison did not object, but maintained that the city should bear most of the cost of the relocation. The city did not agree, and adopted the "Telegraph Road Improvement and Underground Relocation of Overhead Lines Ordinance," which required utilities with overhead facilities along Telegraph Road to immediately relocate those facilities underground at their own cost. The city then sued Detroit Edison, asking the court to order Detroit Edison to comply with the ordinance. Detroit Edison relied on various rules adopted by the Michigan Public Service Commission and a tariff to support Detroit Edison's claim that it was not obligated to bear the cost of relocation. But the trial court ruled in the city's favor; the court also determined that Detroit Edison owed the city about $2.6 million for preliminary work that the city had already done to relocate the wires. In a published opinion, the Court of Appeals affirmed the trial court's determination that Detroit Edison had to bear the cost of the relocation. But the appellate court remanded the case to the trial court for further proceedings regarding the work performed by the city and the amount of damages owed by Detroit Edison. Detroit Edison appeals.

Afternoon Session

GREENE v A.P. PRODUCTS, LTD., et al. (case nos. 127718, 127734)
Attorney for plaintiff Cheryce Greene, as Personal Representative of the Estate of Keimer Easley, Deceased: Ramona C. Howard/(313) 961-4400
Attorney for defendants A. P. Products, Ltd., and Revlon Consumer Products Corporation: Ernest R. Bazzana/(313) 965-3900
Attorney for defendant Super 7 Beauty Supply, Inc., f/k/a Pro Care Beauty Service, Inc., f/k/a Pro Care Beauty Supply: Howard S. Weingarden/(248) 626-5000
Trial court: Wayne County Circuit Court
At issue: In this products liability case, a young child died after a bottle of ginseng oil spilled onto his face and he ingested the oil. His mother sued the product's manufacturer and seller, arguing that the product was defective and lacked appropriate warnings. The Court of Appeals reinstated her lawsuit after it was dismissed by the trial court. Did the Court of Appeals properly analyze the open and obvious doctrine? Did the Court of Appeals err in concluding that the product at issue was not a "simple" product? Did the Court of Appeals err in failing to recognize the plaintiff as a sophisticated user, MCL 600.2945(j)? Was aspiration of this product a foreseeable misuse, and should the material risk of such misuse have been obvious to a reasonably prudent product user?

Background: Cheryce Greene purchased a bottle of Ginseng Miracle Wonder 8 Oil, Hair & Body Mist–Captivate from Super 7 Beauty Supply. The packaging for Wonder 8 Oil, including the labeling, is manufactured by A. P. Products, Ltd., which was later acquired by Revlon. The spray-on product contained no warnings that it could be harmful or fatal if swallowed, or that it should be kept out of the reach of children. Greene's 11-month-old son died from ingesting a significant amount of the product into his lungs after it was left out, with a cracked spray cap, where the child could reach it; the cap came off when the child lifted the bottle, allowing the oil to dump onto his face. Greene sued Super 7 Beauty Supply, A.P. Products, and Revlon. Super 7 Beauty Supply moved for summary disposition, arguing that the case against it should be dismissed because Greene had failed to establish that Super 7, as the product's seller and not the manufacturer, was independently negligent. Super 7 further argued that Greene had not shown that the product was unfit for its ordinary uses or for a particular purpose. A. P. Products and Revlon also moved for summary disposition, contending that the lack of a warning was not the proximate cause of the child's death and that the product was misused in a way that was not reasonably foreseeable. The trial court granted summary disposition to all the defendants and dismissed the Greene's lawsuit. Greene appealed. In a published opinion, the Court of Appeals reversed the trial court's ruling and remanded the case for trial. The Court of Appeals concluded that a jury should be allowed to decide whether the Wonder 8 Oil required a warning and whether Greene established that a defect in the product was the proximate cause of her son's death. The defendants appeal.

REED v BRETON, et al. (case nos. 127703, 127704)
Attorneys for plaintiff Lawrence Reed, Personal Representative of the Estate of Lance Nathan Reed: John D. Pirich, Andrea L. Hansen/(517) 484-8282
Attorneys for plaintiff James Kuenner, Personal Representative of the Estate of Adam W. Kuenner: John D. Pirich, Andrea L. Hansen/(517) 484-8282
Attorney for defendant Beach Bar, Inc., a/k/a/ Beach Bar: Megan K. Cavanagh/(313) 446-5549
Trial court: Jackson County Circuit Court
At issue: A retailer that sells liquor to a "visibly intoxicated person" can be liable, under the dramshop act, if the intoxicated person then causes damage or injury to another person. But MCL 436.1801(8) states that a retailer has a rebuttable presumption of nonliability if it is not the last place the intoxicated person consumed alcohol. What evidence must a plaintiff show in order to rebut the nonliability presumption? Can a plaintiff create an issue of fact with expert testimony that a driver "must have been" visibly intoxicated at the bar, given his blood-alcohol level at the time of the accident, if eyewitnesses testify that the driver did not appear "visibly intoxicated" at the bar?
Background: After spending several hours at the Beach Bar, Curtis Breton apparently fell asleep while driving and collided head-on at 100 miles per hour with a vehicle occupied by Adam Kuenner and Lance Reed. All three men died. It was later determined that Breton's blood alcohol level was 0.215 percent at the time of the accident; testimony indicated that Breton had been drinking much of the day and that the Beach Bar was not the last place to serve him. The plaintiffs, the personal representatives of Kuenner and Reed, filed separate lawsuits against Beach Bar, alleging that the bar was negligent for selling intoxicating liquor to a "visibly intoxicated person" in violation of MCL 436.1801(3). The trial court consolidated the cases. Beach Bar asked the trial court to dismiss both lawsuits, arguing that, because the bar was not the

last establishment to serve Breton, it was entitled to a rebuttable presumption against liability under MCL 436.1808(8). Beach Bar argued that plaintiffs could not overcome the presumption of nonliability because they had no evidence from any of the witnesses who saw Breton that day that Breton was "visibly intoxicated" while at Beach Bar. In response, the plaintiffs presented the reports of two expert witness toxicologists who concluded that, given the concentration of alcohol in Breton's system, he must have been visibly intoxicated. The trial court granted the bar's motion for summary disposition and dismissed the plaintiffs' claims. The trial court held that the plaintiffs failed to present positive, unequivocal, strong and credible evidence that Breton was visibly intoxicated when he was served at Beach Bar. The plaintiffs appealed and, in a published opinion, the Court of Appeals reversed and remanded for trial. The plaintiffs only needed to present competent and credible evidence that it was more probable than not that Breton was visibly intoxicated when he was served at Beach Bar, the Court of Appeals concluded. The appellate court found that the plaintiffs' expert testimony met this standard. Beach Bar appeals.

Wednesday, March 8
Morning Session

COBLENTZ, et al. v CITY OF NOVI (case no. 127715)
Attorney for plaintiffs Ann Coblentz, Lee Coblentz, John Lewandowski, and Deborah Lewandowski: Richard D. Wilson/(248) 858-2443
Attorneys for defendant City of Novi: Gerald A. Fisher, Thomas R. Schultz/(248) 851-9500
Trial court: Oakland County Circuit Court
At issue: The plaintiffs requested, through the Freedom of Information Act, copies of documents associated with a settlement agreement between the city of Novi and a developer. Did the lower courts correctly uphold the defendant's refusal to provide the documents? Was additional discovery warranted? Was it proper for the trial court to assess costs for the services of the City Attorney?
Background: This Freedom of Information Act (FOIA) case involves a request for documents associated with a 2002 settlement agreement between a developer and the city of Novi. That agreement transferred 75 acres of "undeveloped woodland and parkland" from the city to the developer. The city also executed a release and discharge of certain deed restrictions on the property. In addition, the city sought to have the plaintiffs, both adjoining property owners, forgo their right to enforce the deed restrictions. The plaintiffs made a FOIA request for copies of certain exhibits to the settlement, "global readings" and site plans, and certain side letters or side agreements. The city asserted that some of the requested materials did not exist and that others were exempt from disclosure under FOIA. The trial court upheld the city's nondisclosure of the documents. In addition, the court ordered the plaintiffs to pay the city an attorney fee for some of the costs the city incurred in responding to the FOIA request. The Court of Appeals affirmed in a published opinion. The plaintiffs did not request the alleged missing exhibits to the settlement, the Court of Appeals held. Moreover, the plaintiffs did not support their claim that global readings or site plans existed, the appellate court added; the court noted that the city's mayor provided an affidavit stating that no such documents existed at the time of the plaintiffs' request. The Court of Appeals also held that the requested side letters were exempt from disclosure pursuant to MCL 15.243(1)(f), which protects certain "trade secrets or commercial or financial information" that is voluntarily provided to an agency for use in developing governmental

policy. Finally, the Court of Appeals affirmed the trial court's award to the city of an attorney fee. The plaintiffs challenge all of these rulings on appeal.

ANTRIM COUNTY TREASURER v STATE OF MICHIGAN, et al. (case no. 127212)
Attorney for plaintiff Antrim County Treasurer: Charles H. Koop/(231) 533-6860
Attorney for defendants State of Michigan, and Department of Treasury: Kevin T. Smith/(517) 373-3203
Attorney for defendants Dominion Reserves, Inc. and Wolverine Gas & Oil Company, Inc.: Mark A. Kehoe/(616) 632-8000
Attorney for defendant Pure Resources, L.P.: John J. Lynch/(989) 773-9961
Attorney for amicus curiae State Bar of Michigan's Real Property Law Section: Allison J. Mulder/(616) 752-2000
Attorney for amicus curiae Michigan Oil and Gas Association: David L. Porteous/(231) 832-3231
Attorney for amicus curiae Michigan United Conservation Clubs, et al.: Peter W. Steketee/(616) 949-6551
Trial court: Antrim County Circuit Court
At issue: The General Property Tax Act (GPTA) provides that, upon foreclosure for nonpayment of property taxes, "all existing recorded and unrecorded interests in that property are extinguished." This case concerns the effect that such a foreclosure has on subsurface oil and gas interests that were either sold or leased by the property owner to others. Is a lessee of such mineral rights entitled to notice in foreclosure proceedings under the GPTA? Does a lessee have a "severed" mineral interest that is unaffected by foreclosure proceedings involving the surface estate? And do the State of Michigan and the Department of Treasury have standing to pursue this appeal?
Background: Plaintiff Antrim County Treasurer filed a foreclosure action under the General Property Tax Act (GPTA) after certain property owners failed to pay ad valorem taxes. The circuit court entered an order of foreclosure that affected more than one hundred parcels located in Lakes of the North, a subdivision overlying a large reserve of natural gas and oil. Antrim County sought a court ruling on what effect the foreclosure process would have on severed oil and gas rights on those properties. The State and the Department of Treasury argued that all oil and gas rights were subject to forfeiture upon foreclosure, pursuant to GPTA. But Pure Resources, Dominion Reserves, and Wolverine Gas & Oil argued that GPTA violates the due process and takings clauses of the state and federal constitutions. They also sought a declaratory judgment that severed oil and gas rights are exempt from ad valorem property taxes and therefore not subject to foreclosure. The trial court agreed, ruling that the oil and gas interests that had been severed from the surface estate were not subject to foreclosure under GPTA. In addition, the trial court concluded that GPTA, as amended, does not provide due process to the owners of severed oil and gas interests because it would be impossible for the foreclosing governmental unit to determine the identities of all of the owners of fractional interests and provide notice to all of those entities. The court also determined that, if GPTA is interpreted to extinguish severed oil and gas interests, it would violate the takings clauses of the state and federal constitutions. The Court of Appeals affirmed in a published opinion. The State and the Department of Treasury appeal.

GRIEVANCE ADMINISTRATOR v FIEGER (case no. 127547)
Attorneys for petitioner Grievance Administrator: Robert E. Edick**,** Dina P. Dajani/(313) 961-6585
Attorney for respondent Geoffrey N. Fieger: Kenneth M. Mogill/**(**248) 814-9470
Lower tribunal: Attorney Discipline Board
At issue: The Grievance Administrator concluded that the respondent attorney made offensive comments on two radio programs about three Court of Appeals judges who issued a decision adverse to the attorney's client. After the Grievance Administrator filed a formal ethics complaint, the attorney pleaded no contest to violations of the Michigan Rules of Professional Conduct in exchange for an order of reprimand and the opportunity to challenge the constitutionality of the rules. On appeal, the Attorney Discipline Board vacated the order of reprimand and dismissed the complaint. What is the scope of lawyers' First Amendment rights? Does the Attorney Discipline Board have the authority to declare the Michigan Rules of Professional Conduct unconstitutional?
Background: The Court of Appeals overturned a $15 million medical malpractice verdict in a case in which attorney Geoffrey Fieger represented the plaintiff. Several days later, Fieger appeared on two live radio broadcasts and made remarks about Court of Appeals Judges Richard Bandstra, Jane Markey, and Michael Talbot, who were on the panel in that case. The Grievance Administrator alleged that these remarks violated the Michigan Rules of Professional Conduct (MRPC) and filed a formal complaint. Ultimately, Fieger entered a conditional plea of no contest to violations of MRPC 3.5(c) (undignified or discourteous conduct toward a tribunal) and 6.5(a) (treating all persons involved in the legal process with courtesy and respect), while reserving the right to challenge the constitutionality and applicability of the rules. An order of reprimand was entered based on the no contest plea. Fieger appealed to the Attorney Disciplinary Board, which vacated the reprimand order and dismissed the formal complaint. A plurality of Board Members found the rules unconstitutional. The Grievance Administrator appeals.

Afternoon Session

PEOPLE v MCCULLER (case no. 128161)
Prosecuting attorney: David G. Gorcyca/(248) 858-5230
Attorney for defendant Raymond A. McCuller: Desiree M. Ferguson/(313) 256-9833
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: William E. Molner/(517) 373-4875
Attorney for amicus curiae Criminal Defense Attorneys of Michigan: Kimberly Thomas/(734) 647-4054
Trial court: Oakland County Circuit Court
At issue: In *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), the United States Supreme Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt or admitted by the defendant. In this case, the sentencing guidelines would have called for a cap of twelve months in jail (an "intermediate sanction") had the sentencing judge not made additional factual findings that had the effect of increasing the defendant's sentencing guidelines and permitting the imposition of a term of imprisonment. Does the defendant's sentence violate *Blakely*?

Background: Larry Smith testified that Raymond McCuller assaulted him with an object that looked like a bat or a pipe. Smith suffered a broken nose, broken cheek bone, broken eye socket, fractured skull, and collapsed right inner ear wall; he also lost the teeth on the right side of his lower jawbone. The jury found McCuller guilty of assault with intent to do great bodily harm. At sentencing, the trial court determined McCuller's prior record variable score (PRV) and his offense variable (OV) score, in order to find the range within which McCuller's minimum sentence should fall. The judge assessed points for Offense Variable 1, because McCuller touched the victim with a type of weapon; Offense Variable 2, because McCuller possessed or used a potentially lethal weapon; and Offense Variable 3, because McCuller inflicted life-threatening or permanently incapacitating injury on the victim. After adding up all the PRV and OV points, the judge consulted the sentencing guidelines, which indicated that a proper minimum sentence for McCuller, as a habitual offender, was in the range of five to 28 months. The judge ordered McCuller to serve a prison term of 24 months to 15 years. McCuller claims that the judge violated *Blakely* by increasing the sanction for his crime on the basis of facts that McCuller did not admit and that were not submitted to the jury and proven beyond a reasonable doubt. He further argues that, if the judge had not considered the conduct described above when assessing McCuller's offense variables, the sentencing guidelines range would have indicated a proper minimum sentence of only zero to 11 months. A range of zero to 11 months calls for the imposition of an "intermediate sanction," which means that the sentencing judge cannot sentence such a defendant to a prison term without departing from the guidelines. Accordingly, his prison sentence is illegal, McCuller argues. He also claims that the trial court erred in excluding evidence that a prosecution witness was biased against him. The Court of Appeals affirmed McCuller's conviction and sentence in an unpublished opinion. McCuller appeals.

Thursday, March 9
Morning Session Only

FORD MOTOR COMPANY v CITY OF WOODHAVEN, et al. (case nos. 127422-127424)
Attorneys for petitioner Ford Motor Company: John D. Pirich/(517) 484-8282, Jeffrey A. Hyman/(313) 465-7000
Attorneys for respondents City of Woodhaven, and County of Wayne: Dale T. McPherson/(313) 885-4700, Richard G. Stanley/(313) 224-5030
Attorneys for respondent City of Sterling Heights: Robert Charles Davis/(586) 997-6440, Ralph Colasuonno/(586) 997-6474
Attorney for respondent Township of Bruce: Lawrence W. Dloski/(586) 469-3800
Attorney for amicus curiae Michigan Retailers Association: James P. Hallan/(517) 372-5757
Lower tribunal: Michigan Tax Tribunal
At issue: Ford Motor Company filed personal property tax returns that contained errors; Ford paid excess taxes of about $2 million. MCL 211.53a provides a three-year statute of limitations for the refund of excess payments if there was a "mutual mistake of fact." Is this a "mutual" mistake?
Background: In each of these cases, Ford Motor Company filed statements of personal property for tax purposes that contained errors. For example, Ford's statements of personal property listed some property that Ford no longer owned. The various tax assessors involved did not personally review the property or determine whether it should be listed, but used the personal property statements to determine the amount of tax. Ford claimed that there was a mutual mistake of fact

and that the excess payments should be refunded. Ford argues that its mistake of fact was improperly listing personal property and that the assessor's mistake of fact was relying on the improper listing. The Michigan Tax Tribunal disagreed, concluding that Ford's " 'incorrect reporting' of its personal property on its personal property statement is neither a clerical error nor mutual mistake of fact made by the assessing officer and taxpayer." The Court of Appeals, in two unpublished and one published opinion, affirmed the Michigan Tax Tribunal, with one judge dissenting. Ford appeals.

POLICE OFFICERS ASSOCIATION OF MICHIGAN v OTTAWA COUNTY SHERIFF, et al. (case no. 127503)

Attorney for plaintiff Police Officers Association of Michigan: Frank A. Guido/(313) 937-9000

Attorney for defendants Ottawa County Sheriff, Ottawa County, and Ottawa County Board of Commissioners: Douglas W. Van Essen/(616) 988-5600

Attorneys for amicus curiae Michigan Municipal League: Dennis B. Dubay, Richard W. Fanning, Jr./(313) 965-7610

Trial court: Ottawa County Circuit Court

At issue: This case concerns the rules that apply to compulsory arbitration of labor disputes in municipal police and fire departments. MCL 423.238 states that: "At or before the conclusion of the hearing held pursuant to section 6, the arbitration panel shall identify the economic issues in dispute . . . . The determination of the arbitration panel as to the issues in dispute and as to which of these issues are economic shall be conclusive." In this case, the arbitration panel refused to accept an additional issue presented to it by the plaintiff at the start of the final hearing. Did the arbitration panel's refusal to accept the new issue violate MCL 423.238? Does a reviewing court have the authority to direct the arbitration panel to reconsider its determination of the issues involved in the dispute?

Background: The plaintiff, the Police Officers Association of Michigan (POAM), is a labor organization that serves as the bargaining agent for the sheriff's deputies, who are employed by the Ottawa County defendants. The collective bargaining agreement between POAM and the Ottawa County defendants expired on December 31, 1999. Several months later, POAM filed a petition on behalf of the sheriff's deputies seeking arbitration under 1969 PA 312, which provides for compulsory arbitration of labor disputes in municipal police and fire departments. At a prehearing conference, the arbitration panel found that the eighteen issues raised by POAM and the Ottawa County defendants were "economic issues." During the next few months, the parties settled all but two of the issues; these two issues were submitted to the arbitration panel for resolution. POAM then sought to raise a new issue, seeking retroactive arbitration of twelve grievances that had arisen since the collective bargaining agreement expired. The Ottawa County defendants argued this new issue was not timely raised. A majority of the arbitration panel agreed. The panel noted its authority under MCL 432.238 to identify the economic issues in dispute "[a]t or before the conclusion of the hearing." It concluded that the use of the word "or" in the statute permitted it to make its determination of the economic issues in dispute before the arbitration hearing. POAM filed a complaint in the Ottawa County Circuit Court, seeking to vacate the panel's refusal to consider its additional issue. The trial court ruled against POAM. POAM then appealed to the Court of Appeals, which reversed in a published opinion, ruling that the arbitration panel erred in not considering POAM's additional issue. The Ottawa County defendants appeal.

WIATER v GREAT LAKES RECOVERY CENTERS, INC. (case no. 128139)
Attorney for plaintiff Gerard J. Wiater: Robert T. Finkbeiner/(906) 228-2800
Attorney for defendant Great Lakes Recovery Centers, Inc.: Michael G. Summers/(906) 225-1000
Trial court: Marquette County Circuit Court
At issue: A premises owner owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516 (2001). However, a premises owner is not required to protect an invitee from an open and obvious condition unless special aspects of the condition make it unreasonably dangerous. In this case, the plaintiff slipped and fell on the defendant's icy parking lot. Was the plaintiff an invitee? If so, was the danger posed by the icy parking lot open and obvious? Did any "special aspects" exist?
Background: Gerard Wiater parked in Great Lakes Recovery Center's parking lot and went inside to pick up a resident of the center. As Wiater and the resident were getting into Wiater's van, Wiater slipped on ice and fell, striking his head on the pavement. He was taken to a hospital for treatment. Wiater sued Great Lakes Recovery Center, claiming that it was responsible for his injuries because it failed to exercise reasonable care in maintaining the parking lot and keeping it free of ice and snow. The Center filed a motion for summary disposition, arguing that Wiater was not an invitee and that the Center was therefore liable only for hidden defects. The Center also argued that, even if Wiater was an invitee, the condition of the parking lot was open and obvious and there was no unreasonably dangerous condition or "special aspect" of the parking lot that would allow Wiater to overcome the open and obvious defense. The trial court granted the Center's motion, but the Court of Appeals reversed in an unpublished opinion. The Court of Appeals found that Wiater was an invitee, and that Wiater created a fact issue over whether the situation involved special aspects that made it unreasonably dangerous. The Center appeals.

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